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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF WASHINGTON

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 KEVIN WILLIAM HARPHAM,

13 Defendant.

Case No. 2:11-cr-00042-JLQ-1

COWLES PUBLISHING COMPANY'S
MEMORANDUM OF AUTHORITIES
IN SUPPORT OF ITS MOTION TO
INTERVENE, UNSEAL THE
AFFIDAVIT FOR COMPLAINT AND
ACCESS CERTAIN GRAND JURY
MATERIAL DISCLOSED TO THE
DEFENDANT

NOTE ON MOTION CALENDAR:
April 1, 2011 at 6:30 P.M.

18 I. INTRODUCTION/RELIEF REQUESTED

19 Cowles Publishing Company ("Cowles") respectfully requests this Court grant its
20 motion to intervene for the purpose of seeking to unseal the affidavit in support of the
21 criminal complaint filed against Kevin William Harpham, the Defendant herein, and for
22 access to the grand jury materials which the United States has been granted permission
23 to release to the Defendant. Based upon the unopposed nature of United States' motion
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28 COWLES PUBLISHING COMPANY'S
MEMORANDUM TO INTERVENE
AND UNSEAL - 1

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1 to seal the affidavit, it is apparent that no other party currently before the Court
 2 adequately represents Cowles' position in favor of access.¹ In addition, the United States
 3 failed to meet its high burden in justifying the sealing of the affidavit. This Court should
 4 grant Cowles' motion to intervene, unseal the affidavit in support of the criminal
 5 complaint and allow disclosure of the same grand jury materials which will be provided
 6 to the Defendant.
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8 II. STATEMENT OF FACTS

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 10 Cowles Publishing Company publishes *The Spokesman-Review*, the largest daily
 11 newspaper in the Eastern Washington/Northern Idaho market with a daily circulation of
 12 approximately 70,000 papers. *Declaration of Addy Hatch* ("*Hatch Dec.*"), ¶ 2.
 13 Defendant's case has generated a great deal of local interest, and Cowles has actively
 14 followed the case since an explosive device was discovered along the Martin Luther
 15 King, Jr. Parade route in downtown Spokane on January 17, 2011. *Hatch Dec.*, ¶ 3.
 16 Following nearly two months of investigation, the Defendant was arrested on March 8,
 17 2011. *Hatch Dec.*, ¶ 4.
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 20 On March 8, 2011, the United States filed a criminal complaint against the
 21 Defendant (Dkt. No. 1), which complaint was apparently supported by an affidavit (Dkt.
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 25 ¹ Cowles is aware that KXLY-TV filed a "Motion to Unseal Documents" on March 30,
 26 2011 (Dkt. No. 43). Cowles hereby joins in that motion and provides the additional
 27 authority in its own motion and memorandum herein.

1 No. 2). The United States also filed a Motion to Seal Affidavit for Complaint (Dkt. No.
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3 3). United States District Court Magistrate Judge Cynthia Imbrogno entered an Order to
4 Seal Affidavit for Complaint that same day (Dkt. No. 8). The motion to seal was not
5 opposed, and there are no written findings of fact supporting to the Order to seal the
6 affidavit. Cowles' representatives have made requests for access to the affidavit, but
7 have been informed that the document is under seal and not available to the public or
8 press. *Hatch Dec.*, ¶ 5.
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11 Since the Order sealing the affidavit was entered, the Defendant has made his
12 initial appearance (Dkt. No. 13), been indicted (Dkt. No. 21) and been arraigned and
13 pled not guilty to the two federal charges filed in the complaint (Dkt No. 25). In a
14 recent filing, the United States indicated that it has provided a copy of the affidavit in
15 support of the criminal complaint to counsel for the Defendant. (See Dkt. No. 41, page
16 3).
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19 In addition, the United States filed a motion to release certain documents and
20 portions of grand jury testimony to the Defendant. (Dkt. No. 37). The Court recently
21 granted the United States' motion. (Dkt. No. 44).
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23 III. STATEMENT OF ISSUES

- 24 1. Whether Cowles should be allowed to intervene for the purpose of
25 seeking access to the sealed affidavit for complaint and the grand jury
26 materials which will be provided to the Defendant?
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2. Whether the affidavit for complaint should be unsealed, and the grand jury materials made available to the public, where no notice was given to the public of the motion to seal, no compelling reasons for sealing were proposed, and no factual findings or evidentiary support were provided to justify the sealing?

IV. ARGUMENT

A. Cowles' Motion to Intervene Should be Granted

Cowles' motion to intervene should be granted pursuant to the long-standing tradition of common-law and First Amendment access to judicial process and documents, as recognized by the Supreme Court, the Ninth Circuit and this Court.

The press has a recognized right of access to court records and proceedings. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.") More than just a general right to access, "there is a strong presumption in favor of the common law right to inspect and copy judicial records." *Phoenix Newspapers, Inc. v. U.S. District Court*, 156 F.3d 940, 946 (9th Cir. 1998).

Cowles should be allowed to intervene in the present matter. Cowles is a news organization whose task, among others, is to shed light upon all phases of the criminal process, and it is currently precluded from doing so based upon the sealed nature of the affidavit and the secrecy of the grand jury materials. The motion to seal the affidavit

1 was not opposed by the Defendant, nor did the United States give any notice to the
2 public at large that the affidavit would be sealed. In this critical instance given that this
3 case involves allegations of politically motivated violence, it is more important than ever
4 that the prosecution be conducted as transparently as possible to reaffirm the public's
5 belief in the criminal justice system and the rule of law.
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8 **B. The Affidavit for Complaint Should be Unsealed**

9 The affidavit for complaint should be unsealed due to the lack of compelling
10 interests identified in support of sealing, the absence of factual findings to support the
11 compelling interests, and the lack of notice to any party in opposition prior to sealing the
12 affidavit.
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15 **1. Constitutional Right to Access Judicial Documents**

16 In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980), the
17 Supreme Court noted that "historical evidence demonstrates conclusively that at a time
18 when our organic laws were adopted, criminal trials both here and in England had long
19 been presumptively open. ... [I]t has long been recognized as an indispensable attribute
20 of an Anglo-American trial." Relying upon that history, the Court announced that "from
21 this unbroken, uncontradicted history, supported by reasons as valid today as in
22 centuries past, we are bound to conclude that a presumption of openness inheres in the
23 very nature of a criminal trial under our system of justice." *Id.* at 573.
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1 In order to overcome this presumption of openness, a proponent of closure must
 2 pass an incredibly high standard:
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4 Where ... the State attempts to deny the right of access in order to inhibit
 5 the disclosure of sensitive information, it must be shown that the denial is
 6 necessitated by a compelling government interest, and is narrowly tailored
 7 to serve that interest. The presumption of openness may be overcome only
 8 by an overriding interest based on findings that closure is essential to
 9 preserve higher values and is narrowly tailored to serve that interest. The
 10 interest is to be articulated along with findings specific enough that a
 11 reviewing court can determine whether the closure order was properly
 12 entered.

13 *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*).

14 In the Ninth Circuit, "[t]he party seeking to seal a judicial record 'must articulate
 15 compelling reasons supported by specific factual findings that outweigh the general
 16 history of access and the public policies favoring disclosure, such as the public interest
 17 in understanding the judicial process' ...[I]f the court decides to seal certain judicial
 18 records, it must 'base its decision on a compelling reason and articulate the factual basis
 19 for its ruling, without relying on hypothesis or conjecture.'" *Kamakana v. City and*
 20 *County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (internal citations omitted);
 21 *see also Oregonian Publ'g Co. v. District Court*, 920 F.2d 1462, 1467 ("It is the burden
 22 of the party seeking closure ... to present facts supporting closure and to demonstrate
 23 that available alternatives will not protect his rights.")
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1 The import of public records in informing the public about the criminal justice
 2 system is of utmost importance and cannot be abrogated absent specific factual findings:
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4 'While we deliberate in private, we recognize the fundamental importance of
 5 issuing public decisions after public arguments based on public records.
 6 Accordingly, '[a]ny step that withdraws an element of the judicial process
 7 from public view makes the ensuing decision look more like fiat, which
 8 requires compelling justification.'

9 *United States v. Stoterau*, 524 F.3d 988, 1012 (9th Cir. 2008) (internal citations
 10 omitted).

11 **2. Constitutional Test to Determine Right of Access**

12 The Ninth Circuit has long recognized that "the public and the press have a right
 13 of access to criminal proceedings and documents filed therein," and that that "right of
 14 access is grounded in the First Amendment and in common law." *CBS, Inc. v. District*
 15 *Court*, 765 F.2d 823, 825 (9th Cir. 1985). Because courtroom space is limited and the
 16 general public dispersed, "the media plays an indispensable representative role in
 17 gathering and disseminating to the public current information on trials." *Valley*
 18 *Broadcasting Co. v. District Court*, 798 F.2d at 1292, citing *Richmond Newspapers*, 448
 19 U.S. at 581-82, n. 18. That role is particularly important in this case where the
 20 Defendant is accused of crimes which had the potential to injure, maim or kill multiple
 21 people within the Eastern District, many of whom may be following the investigation,
 22 arrest and subsequent trial of the Defendant through the news media.
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1 To determine whether a first amendment right of access exists for a particular
 2 document, courts apply the "experience and logic" test. *United States v. Kott*, 380
 3 F.Supp.2d 1122, 1123 (C.D. Ca. 2004). "First, the court is to decide whether the type of
 4 document has traditionally been open and available to the public. Second, the court is to
 5 determine whether public access to the document would serve as a curb on prosecutorial
 6 or judicial misconduct or otherwise further the public interest in understanding the
 7 criminal justice system." *Id.*

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 11 *a. The information contained within an affidavit for complaint is*
 12 *traditionally public*

13 The affidavit for complaint was presumptively filed to support the Defendant's
 14 detention after his arrest and before his initial appearance. At the Defendant's initial
 15 appearance, the United States must present evidence to justify the probable cause that
 16 supported the arrest, which information is generally found in the affidavit.
 17 Fed.R.Crim.P. 4(a), 5(b). Also at that hearing, if pre-trial detention of the Defendant is
 18 requested, the United States must establish the grounds for detention under 18 U.S.C. §
 19 3412(e), which facts are also primarily contained within the affidavit for complaint. The
 20 public has a qualified First Amendment right to access these preliminary hearings.
 21 *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (*Press-Enterprise II*).
 22 Consequently, there is an historical right of public access to the information contained in
 23 the sealed affidavit in this case.
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1 In cases where there is no established history to counsel the Court as to access to a
2 particular document, "logic alone, even without experience, may be enough to establish
3 the right." *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008), *citing Seattle*
4 *Times Co. v. District Court*, 845 F.2d 1513, 1516-17 ("[E]ven without an 'unbroken
5 history of public access,' the First Amendment right exists if 'public scrutiny' would
6 'benefit' the proceedings"). There is no historical precedent to establish that affidavits
7 filed in support of criminal complaints are traditionally kept secret. Rather, logic
8 dictates that release of the affidavit, and the increased public scrutiny would benefit the
9 proceedings by shedding light on the investigative measures and underlying basis to
10 charge the Defendant with the crimes alleged in the complaint. The affidavit for
11 complaint meets the first part of the *Kott* test.

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16 *b. Access will curb prosecutorial misconduct and further the public's*
17 *interest in the criminal justice system*

18 The Defendant's case has created a large amount of local interest, and, to date,
19 very little is known regarding the basis for the Defendant's arrest, the criminal complaint
20 and subsequent indictment. Release of the affidavit will allow the public to observe the
21 criminal justice system and ensure that the United States acts properly in this high-
22 profile matter involving an alleged politically motivated attempt at violence. Access
23 further affords the public the information it needs to monitor the federal government and
24 hold it accountable. *Times Mirror Co. v. Untied States*, 873 F.2d 1210, 1213 (9th Cir.
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1 1989), citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). "The
2 bright light cast upon the judicial process by public observation diminishes the
3 possibilities for injustice, incompetence, perjury and fraud." *Gambale v. Deutsche Bank*
4 *AG*, 377 F.3d 133, 140 (2nd Cir. 2004). Cowles has a First Amendment right to the
5 sealed affidavit.
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7 8 **3. The Procedural Requirements for Sealing Were Not Met**

9 Once a First Amendment right has been established, the burden shifts to the party
10 opposing access to demonstrate that non-disclosure "is strictly and inescapably
11 necessary" to protect the Defendant's fair trial guarantee or some other compelling
12 interest. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 440 (1979). A party seeking to
13 seal a judicial record bears the burden of overcoming the strong presumption of access
14 by "articulat[ing] compelling reasons supported by specific factual findings." *San Jose*
15 *Mercury News, Inc. v. District Court*, 187 F.3d 1096, 1102-03 (9th Cir. 1999). In order
16 to satisfy constitutional procedural requirements before a document may be sealed, the
17 Court must do so "on the basis of articulated facts known to the court, not on the basis of
18 unsupported hypothesis or conjecture...[I]t is vital for a court clearly to state the basis of
19 its ruling, so as to permit appellate review of whether relevant factors were considered
20 and given appropriate weight." *Valley Broadcasting*, 798 F.2d at 1294.
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Here, the public and the press were unable to participate in the process leading to the decision to seal the affidavit without any notice or opportunity to object; the criminal complaint, affidavit, motion to seal and sealing order were all issued on the same date. The United States did not provide any justification for the sealing in its Motion to Seal the Affidavit for Complaint (Dkt. No. 3), and the Court's Order to Seal Affidavit for Complaint (Dkt. No. 8) did not discuss or balance any of the relevant factors prior to sealing. No compelling interests were presented to the court, no balancing took place, and no on-the-record findings were entered. As noted in *United States v. Biogan*, 510 F.3d 844, 848 (9th Cir. 2007) "failure to follow proper procedures as a predicate to closure of the courtroom would [be] error."

4. The Substantive Requirements for Sealing Were Not Met

Assuming, counterfactually, that the procedural requirements for sealing had occurred, a three part substantive test must be met before sealing may be ordered:

[C]riminal proceedings and documents may be closed to the public without violating the first amendment only if three substantive requirements are satisfied: 1) closure serves a compelling interest; 2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and 3) there are no alternatives to closure that would adequately protect the compelling interest.

Oregonian, 920 F.2d at 1466, citing *Press-Enterprise II*, 478 U.S. 1, 13-14.

In the present case, the unsealing of the affidavit is particularly justified. The Defendant has already been arrested, indicted and arraigned, so there is no potential

harm or prejudice to an ongoing investigation. In addition, the affidavit for complaint, as well as five search warrants, have already been shared with the Defendant (*see* Dkt. No. 41, p. 3, ll. 7-12), and the United States was recently granted permission to disclose portions of the grand jury proceedings and supporting documents to the Defendant (Dkt. No. 44). Consequently, there is no prejudice to the Defendant based upon the release of the affidavit to the press and public, and there is no substantial probability that any compelling interest will be harmed by the unsealing of the affidavit. As stated by our Supreme Court, "public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *DePasquale*, 443 U.S. at 429.

C. The Grand Jury Material Released to the Defendant Should be Made Available to the Public

Cowles has a qualified First Amendment right to access to judicial records. Grand jury records, when otherwise not disclosed, have typically been afforded secrecy. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); *In re Special Grand Jury (for Anchorage, Alaska)*, 674 F.2d 778 (9th Cir. 1982); *see also* Fed.R.Crim.P. 6(e). Ordinarily, a Defendant must make a request for grand jury material and demonstrate that "a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed.R.Crim.P. 6(e)(3)(E)(ii). In this case,

1 however, the United States moved to disclose "documents subpoenaed by the grand jury
2 and any and all grand jury transcripts to the Defendant and his attorney." (Dkt. No. 38,
3 page 3). The Court ordered that the production be made. (Dkt. No. 44).
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5 The Defendant will soon be in possession, if he is not already, of all of the
6 relevant documents and testimony presented to the grand jury that led to his indictment
7 in this matter. Once the grand jury documents are provided to the Defendant and his
8 counsel, there is no longer any obvious justification to keep those materials shielded
9 from the public.
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12 The bottom line is that an individual has been charged with two serious federal
13 crimes without any public explanation or analysis of the basis for the complaint or
14 indictment. What steps did the authorities take in the investigation? What allowed them
15 to narrow in on the Defendant six weeks after the explosive device was detected? What
16 evidence was presented to the grand jury that allowed the United States to arrest and
17 prosecute this particular individual? Without access to the sealed affidavit and grand
18 jury materials that establish the basis for the charges against the Defendant, justice is
19 being meted out behind closed doors – a process that is anathema to the long tradition of
20 public access to and understanding of the criminal justice system in this country.
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V. CONCLUSION

Cowles Publishing Company's motion to intervene should be Granted, the Affidavit for Complaint should be unsealed and the grand jury materials furnished to the Defendant pursuant to this Court's Order (Dkt. No. 44) should be made available to the public.

DATED this 1st day of April, 2011.

WITHERSPOON · KELLEY, P.S.

By: / s/ Leslie R. Weatherhead

Leslie R. Weatherhead, WSBA No. 11207

Steven J. Dixon, WSBA No. 38101

Attorneys for Cowles Publishing Company

CERTIFICATE OF SERVICE

1. I, Alicia Asplint, am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within action. I am employed by the law firm of Witherspoon · Kelley, P.S., 422 W. Riverside Avenue, Suite 1100, Spokane, Washington.

2. On the 1st day of April, 2011, I caused to be served upon the parties via the CM/ECF filing system, Cowles Publishing Company's Memorandum Of Authorities In Support Of Its Motion To Intervene And Unseal The Affidavit For Complaint and Grand Jury Materials, which system will send notification of such filing to the following:

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